HARLAN CUMBERLAND COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-330 Decided May 21, 1992

Appeal from a decision of Administrative Law Judge David Torbett holding that Notice of Violation No. 87-81-061-001 was validly issued. NX 7-86-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

   Regulation 30 CFR 843.17 provides that no notice of violation may be vacated for the agency's failure to give the notice to the state regulatory authority required by 30 CFR 842.11(b)(1)(ii)(B).

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions

   Regulation 30 CFR 817.121(c)(1), requiring an operator to correct any material damage resulting from subsidence caused to surface lands, and regulation 405 KAR 18:210 § 3(2)(a), modelled thereon, are supported by section 516(b)(1) of SMCRA, 30 U.S.C. § 1266(b)(1) (1988), which requires that each permit require the operator to adopt measures consistent with known technology in order to, inter alia, prevent subsidence causing material damage to the extent technologically and economically feasible and to maintain the value and reasonably foreseeable use of surface lands.

APPEARANCES: H. Kent Hendrickson, Esq., Harlan, Kentucky, for appellant; Paul A. Molinar, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Harlan Cumberland Coal Company has appealed from a decision of Administrative Law Judge David Torbett, dated March 8, 1988, holding that Notice

of Violation (NOV) No. 87-81-061-001 was validly issued by the Office of Surface Mining Reclamation and Enforcement (OSM). This notice cited appellant for violation of 405 Kentucky Administrative Regulation (KAR) 18:210, which requires that "[u]nderground mining activities shall be planned and conducted so as to prevent subsidence from causing material damage to the surface, to the extent technologically and economically feasible, and so as to maintain the value and reasonably foreseeable use of surface lands." Judge Torbett's decision also imposed upon appellant the responsibility, as set forth at 405 KAR 18:210 § 3(2)(a), to restore all land damaged by subsidence.

Judge Torbett issued the decision on appeal after he had conducted a hearing on September 3, 1987, which inquired into the causes of subsidence on Little Black Mountain, the situs of appellant's underground mining operation. Causation and other issues were raised by appellant's application for review of NOV No. 87-81-061-001 and by its application for temporary relief. 1/ On appeal, Harlan Cumberland has presented two arguments, neither of which requires that we re-examine in detail Judge Torbett's finding that underground mining by appellant had caused a number of cracks on Little Black Mountain. 2/

Harlan Cumberland's mine is known as the H-2, and mining is conducted pursuant to Kentucky permanent program permit 648-5052, issued May 24, 1984. 3/ This permit authorized appellant to mine the Harlan coal seam in Little Black Mountain, Harlan County, Kentucky. Appellant removed coal by a pillar retreat operation which called for it to remove pillars of coal left standing after advance mining.

Eastover Mining Company also mined the Harlan seam by a pillar retreat operation located adjacent to the H-2 mine. Eastover performed advance mining in 1980 and pillar retreat in 1981-82. Barrier pillars separated the Harlan Cumberland mine from Eastover's operations. Other mining of

1/ Judge Torbett denied appellant's application for temporary relief, reasoning that OSM had shown by a preponderance of the evidence that subsidence was caused by appellant's mining operation. This decision, issued from the bench on Apr. 8, 1987, was appealed by Harlan Cumberland. By order of Oct. 7, 1987, the Board dismissed this appeal (IBLA 87-532) following receipt of appellant's notice of withdrawal of appeal.

2/ Six cracks were identified on the mountain and denoted "A" through "F." Appellant's witness, Scott Martin, testified that cracks "A," "B," "C," and "D" were a result of Harlan Cumberland's mining (Tr. 177-78 (Sept. 3, 1987)). No explanation for crack "E" was given by Martin, and crack "F" was attributable to mining by Eastover Mining Company, Martin testified. Id. at 180. Judge Torbett found that appellant had conceded its responsibility for crack "E" and found appellant's explanation for crack "F" unpersuasive (Decision at 8, 14 (Mar. 8, 1988)).

3/ Prior to this permit, appellant had an interim program permit, denoted 248-5052 and issued on Aug. 9, 1979 (Tr. 150 (Apr. 8, 1987); Exh. R-3).

Little Black Mountain occurred in 1952 when the R.C. Lay Coal Company mined the Darby seam, located above the Harlan seam, by a room and pillar operation.

In January 1985, OSM reclamation specialist Gary Hall inspected Little Black Mountain in response to a citizen's complaint 4/ alleging surface damage caused by subsidence. Finding subsidence cracks 3 to 5 feet wide and 40 feet deep, Hall concluded that there was "a possibility of someone or something falling into these cracks at several points along the breakline" (Exh. R-2). Hall further found that these cracks occurred on the permanent program portion of appellant's permit. On January 10, 1985, Hall issued Ten-Day Notice (TDN) 85-81-061-01 to the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE), stating that appellant had failed to conduct underground mining activities so as to prevent subsidence from causing material damage to the surface. This TDN 5/ is key to Harlan Cumberland's first argument on appeal.

DSMRE inspected the site on two occasions before issuing its response to the TDN on February 14, 1985. 6/ In this response, the agency concluded that it was unable to determine whether appellant had caused the subsidence at issue. Subsidence occurred in an area that overlaps the Darby,

4/ The complainant was Hazel King. See Hazel King, 96 IBLA 216, 94 I.D. 89 (1987), for a full discussion of the response to this complaint. An earlier citizen's complaint by King occasioned Ten-Day Notice (TDN) 84-81-61-02. This TDN, dated July 9, 1984, cited a violation of 405 KAR 18:210 (Exhs. A-5 and A-25).

5/ Section 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a) (1988), authorizes a TDN in these terms:

"Sec. 521. (a)(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection."
(Emphasis added.)

6/ The State was granted two extensions of time to file its response.

Kellioka, 7/ and Harlan seams, DSMRE found, and this fact impeded a determination of the cause of the subsidence. DSMRE concluded by stating that it was not going to take enforcement action at that time, but would continue to gather information and monitor the situation.

In the ensuing months, OSM and DSMRE each made additional inspections, and on October 16, 1986, the agencies, responding to a citizen's complaint, made a joint inspection (Exhs. A-17, R-4, R-5, and R-6). Four days later, DSMRE issued to appellant Notice of Non-Compliance 023769 and Cessation Order 020503. These documents required Harlan Cumberland to cease its present activities and within 10 days complete the following actions: "1. prevent public access to the subsidence area; 2. contact surface owner by certified mail, and 3. prepare detailed plans to permanently correct the imminent danger situation" (Exhs. R-6, A-13, and A-14).

These enforcement actions by the State caused OSM to advise DSMRE on December 3, 1986, that "as a result of the issuance of your Cessation Order and Non-Compliance the violation cited in the Ten-Day Notice has been adequately addressed. The Notice is hereby considered resolved" (Exh. A-15). Despite this communication, OSM continued to inspect the premises.

On January 16, 1987, a further OSM inspection revealed that the subsidence cracks had been fenced with three strands of barbed wire and danger signs had been posted, but no fill material had been placed in the subsidence fissures. Six days later, DSMRE informed OSM that the State considered Notice of Non-Compliance 023769 and Cessation Order 020503 to have been abated.

By letter of January 30, 1987, OSM stated in reply:

> In earlier discussions it had been my understanding that our two agencies were in agreement that these large subsidence cracks needed to be permanently repaired. This office does not believe that the three strands of barbed wire placed around the cracks by the company offer a permanent solution. Therefore, it has been determined that a Federal Notice of Violation (NOV) is to be issued to the company in order that OSM may order effective abatement of the violation.

OSM issued NOV No. 87-81-061-001 to appellant on January 30, 1987, the same date as the above correspondence. As noted supra, this notice cited appellant for violation of 405 KAR 18:210, requiring underground mining to be planned and conducted so as to prevent subsidence from causing material damage to the surface, to the extent technologically and economically feasible, and so as to maintain the value and reasonably foreseeable use of surface lands. Judge Torbett's decision, which held NOV No. 87-81-061-001 to have been validly issued, occasioned the instant appeal. This NOV, it

7/ The Kellioka seam, like the Darby seam, has been mined (Exh. R-3 at 2).

should be noted, had been previously modified by Judge Torbett to require appellant to satisfy 405 KAR 18:210 § 3(2)(a), calling for restoration of damaged lands. 8/

In its statement of reasons (SOR), Harlan Cumberland contends that OSM did not have jurisdiction to issue NOV No. 87-81-061-001. Appellant acknowledges that OSM issued TDN 85-81-061-01 prior to issuing this NOV, but states that OSM's letter of December 3, 1986, which described the TDN as "resolved" by virtue of the State's enforcement actions, effectively vacated the TDN. OSM's letter of December 3, 1986, divested the agency of jurisdiction, appellant argues. "[I]f OSMRE was unhappy with the State's remedial order," appellant maintains, "it should have issued a second TDN to regain jurisdiction and to give the State, which has primacy, the opportunity to proceed with a different mode of enforcement" (SOR, July 13, 1988, at 4 (emphasis added)).

Appellant's mention of primacy raises the issue of OSM's jurisdiction under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (1988). SMCRA is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." See 30 U.S.C. § 1202(a) (1988). The Act's principal regulatory and enforcement provisions are contained in Title V, which establishes a two-tiered regulatory program to achieve the purposes of the statute. The two tiers consist of an interim, or initial, regulatory program and a permanent regulatory program. 30 U.S.C. § 1251 (1988). The interim regulations implemented only a portion of the Act's performance standards, and applied in each state until the state obtained the Secretary's approval of a permanent state regulatory program, or until the Secretary implemented a Federal program for the state. 30 CFR 710.2. Bannock Coal Co. v. OSM, 93 IBLA 225, 232 (1986).

Effective May 18, 1982, the Kentucky State program was conditionally approved by the Secretary. 30 CFR 917.10. On that date, the Kentucky Department of Natural Resources and Environmental Protection was deemed the regulatory authority in Kentucky for surface coal mining and reclamation operations and for coal exploration operations on non-Federal and non-Indian lands. Id.

8/ In his decision denying appellant's application for temporary relief, Judge Torbett modified NOV No. 87-81-061-001. The Judge explained:

"I'm of the opinion that the intent of the regulation [405 KAR 18:210] is that the company, if they break something, they've got to fix it. There is really no evidence that they've been mining wrong or not in accordance with their plan, but the regulation, regardless of whether they mine according to their plan, that they have certain obligations under the regulation and principally 'restore, rehabilitate, or remove and replace each damaged structure, feature or value, promptly after damage is suffered, to the condition it would be in if no subsidence had occurred and restore the land to a condition capable of supporting reasonably foreseeable uses it was capable of supporting before the subsidence." (Tr. 188-89 (Apr. 8, 1987); Decision at 5 n.4 (Mar. 8, 1988)).

When a state program is approved, that state assumes the responsibility for issuing mining permits and enforcing the provisions of its regulatory program. In re: Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). A state's jurisdiction for enforcement of an approved program is primary, but not exclusive. Shamrock Coal Co. v. OSM, 81 IBLA 374, 376 (1984), appeal dismissed, Civ. No. 84-238 (E.D. Ky. May 13, 1987); Turner Brothers, Inc. v. OSM, 92 IBLA 320 (1986), aff'd, Civ. No. 86-380-C (E.D. Okla. Oct. 5, 1987).

Appellant regards OSM's issuance of TDN 85-81-061-01 as an act conferring jurisdiction upon the agency. Section 521(a) of SMCRA, supra at n.5, does not speak in these terms, but it clearly requires OSM, upon receipt of information of a violation of any requirement of the Act or any permit condition required by the Act, to notify the state regulatory authority of such violation. If the state fails within 10 days after notice to take appropriate action to cause such violation to be corrected or to show good cause for such failure and transmit notice to the Secretary, the Secretary is required to immediately order a Federal inspection of the surface coal mining operation. 30 U.S.C. § 1271(a) (1988). If OSM determines that there is a violation of SMCRA, the state program, or any condition of a permit which does not create an imminent danger or environmental harm, it shall immediately issue a notice of violation. 30 CFR 843.12(a); see also Hazel King, 96 IBLA 216, 237, 94 I.D. 89, 101 (1987), and cases cited therein.

[1] Appellant's attack on NOV No. 87-81-061-001 for want of agency "jurisdiction" is directly addressed by regulation 30 CFR 843.17, which states: "No notice of violation, cessation order, show cause order, or order revoking or suspending a permit may be vacated for failure to give the notice to the State regulatory authority required under § 842.11(b)(1)(ii)(B) [9/] of this chapter or because it is subsequently determined that the Office did not have information sufficient under §§ 842.11(b)(1) and 842.11(b)(2) of this chapter, to justify an inspection." (Emphasis added.)

The preamble to 30 CFR 843.17 makes clear that the procedures set forth in section 521(a) of SMCRA were intended to define the State-Federal relationship and were "not intended to benefit the permittee-operator." 44 FR 14,902, 15,305 (Mar. 13, 1979). Where a violation exists, it would violate the spirit of SMCRA to vacate a notice or order simply because it was found that OSM did not have sufficient information under 30 CFR 842.11(b) to justify an inspection. Id.

Regulation 30 CFR 843.17 directly refutes appellant's first argument on appeal and offers no solace to the operator for any agency errors under 30 CFR 842.11(b)(1) and (2). Further, the relevant regulation expressly provides that: "No additional notification to the State * * * is required

9/ The notice referred to here is the 10-day notice provided by OSM to the State pursuant to section 521(a)(1), 30 U.S.C. § 1271(a)(1) (1988).

before issuance of a notice of violation if previous notification was given under § 842.11(b)(l)(ii)(B)." 30 CFR 843.12(a)(2). Accordingly, we reject appellant's first argument that NOV No. 87-81-061-001 must be dismissed for want of authority in OSM.

[2] Harlan Cumberland's second and final argument on appeal is the contention that it did, in fact, satisfy 405 KAR 18:210 by planning and conducting its underground mining activity so as to prevent subsidence
from causing material damage to the surface, to the extent technologically and economically feasible, and so as to maintain the value and reasonably foreseeable use of surface lands. In support, it cites a passage from
Judge Torbett's decision, which states:

> The testimony of all three expert witnesses clearly shows that subsidence prediction is far from being an exact science due to the variety of the factors involved. It would be practically impossible for an operator to predict all actual surface subsidence in his plan. Here, there is no proof of any defect in Applicant's subsidence plan. Neither is there any proof to show that Applicant failed to follow the approved plan. [Footnote omitted.]

Having so conducted its operations, appellant charges error in Judge Torbett's conclusion that it must nevertheless bear the responsibility for repair of those subsidence cracks that it caused. Appellant maintains
that Judge Torbett's conclusion relies upon an incorrect holding by Judge Flannery in In re: Permanent Surface Mining Regulation Litigation, Civ. No. 79-1144 (D.D.C. Oct. 1, 1984). In this litigation, Judge Flannery upheld 30 CFR 817.121(c)(1), 10/ upon which 405 KAR 18:210 § 3(2)(a) is modelled, by finding that "the confluence of §§ 515(b)(2) and 516(b)(10)" supported an operator's duty to repair land damaged by subsidence. National Wildlife Federation v. Lujan, 733 F. Supp. 419, 425 n.12 (D.D.C. 1990).

Judge Flannery's original conclusion, but not his rationale, was approved by the Court of Appeals for the District of Columbia Circuit in National Wildlife Federation v. Hodel, 839 F.2d 694, 739 (D.C. Cir. 1988). The Court of Appeals agreed with appellant Harlan Cumberland that an operator's duty to restore lands damaged by subsidence was not supported by section 516(b)(10) of SMCRA, 30 U.S.C. § 1266(b)(10) (1988), 11/ but

10/ This regulation reads:

"(c) The operator shall--

"(1) Correct any material damage resulting from subsidence caused
to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence * * *."

11/ This statute provides:

"(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to--

the court found an alternate support in section 516(b)(1), 30 U.S.C. § 1266(b)(1) (1988). 12/

The end result of this Federal litigation 13/ is that 30 CFR 817.121(c)(1), and indirectly 405 KAR 18:210 § 3(2)(a), may properly require an operator, such as appellant, to restore lands damaged by subsidence. Accordingly, Judge Torbett's holding that appellant has a duty to restore those lands it damaged by subsidence is affirmed.

fn. 11 (continued)
* * * * * * *

"(10) with respect to other surface impacts not specified in this subsection * * * operate in accordance with the standards established under section 1265 of this title for such effects which result from surface coal mining operations: Provided, That the Secretary shall make such modifications in the requirements imposed by this subparagraph as are necessary to accommodate the distinct difference between surface and underground coal mining."
(Emphasis added.)
The reference to section 1265 in this quotation incorporates the provisions of section 1265(b)(2), inter alia, which state:

"(b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to--

"(2) restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood, so long as such use or uses do not present any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants' declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay in implementation, or is violative of Federal, State, or local law."

Appellant argued that section 1266(b)(10) was inapplicable in the instant case because subsidence was a surface impact clearly specified by subsection 1266(b)(1) (see note 12 below).

12/ Section 1266(b)(1) provides:

"(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to--

"(1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: Provided, That nothing in this subsection shall be construed to prohibit the standard method of room and pillar mining."

13/ See also National Wildlife Federation v. Lujan, 928 F.2d 453, 457 (D.C. Cir. 1991).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

James L. Byrnes
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge